[redacted]

Supreme Court of the United States

[redacted]

No. 839

[redacted]

[redacted]

v.

[redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

FREDERICK A. COOK, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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[Caption omitted]

[fol. 2] No. 2273

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

APPLICATION FOR PROBATION—

Filed February 11, 1927.

To the Honorable James C. Wilson, Judge of said Court:

Comes now Frederick A. Cook hereinafter styled petitioner, and petitions this honorable court to place this defendant upon probation for the period of five years, and to appoint a suitable person to act as probation officer for petitioner when so placed upon probation, to act without compensation, as provided in the Act of March 4, 1925, passed by the Congress of the United States, which Act provides in substance, that the Courts of the United States having original jurisdiction in criminal cases, have the power after conviction to place the defendant upon probation for not exceeding five years, upon such terms and conditions as the court may deem best when it shall appear to the satisfaction of the court that the ends of justice will be thereby subserved. In this connection your petitioner respectfully represents as follows:

That heretofore and on the 21st day of November, A. D. 1923, in cause No. 2273, on the docket of this court your petitioner was convicted on twelve counts of an indictment which charged him with having used the United States' mails in executing a scheme to defraud, within the meaning of section 215 of the United States Criminal Code, and was then and there in this honorable court, sentenced to serve in the United States Penitentiary at Leavenworth, Kansas, a total of fourteen years and nine months, and to pay a fine of $1,000.00 on each of the twelve counts on which he was convicted, [fol. 3] or to pay a total fine of $12,000.00, the said sentence having been imposed by the Honorable James Kil-

litts, acting by designation as judge of this court in said cause No. 2273.

Your petitioner further represents that after his conviction, as aforesaid, he carried his case to the United States Circuit Court of Appeals for the Fifth Circuit by writ of error, for review, and that in the month of February, A. D. 1925, the said Circuit Court of Appeals in all things sustained and affirmed the said judgment of conviction; that thereafter your petitioner made no further attempt to have said cause reviewed by a higher court, but accepted the decision of the said Circuit Court of Appeals as final.

Your petitioner further represents that immediately upon being convicted on November 21, 1923, as aforesaid, he was placed in the custody of the United States Marshal at Fort Worth, Texas, who immediately caused him to be placed and incarcerated in the county jail of Tarrant County, Texas, in the City of Fort Worth, Texas, where he remained confined until after his said case had been affirmed by the said Circuit Court of Appeals, as herein stated, and until the month of April, A. D. 1925, when he was transported to and placed in the United States Penitentiary at Leavenworth, Kansas, since which time he has remained incarcerated in said penitentiary. That, as is shown by the records of this court in said cause No. 2273, this court, through the said judge Killitts, in connection with his appeal by writ of error to the Circuit Court of Appeals, required as a condition precedent to his gaining freedom on bond pending the outcome of said appeal, that your petitioner make and furnish a good and sufficient supersedeas bond conditioned for the payment of the fine of $12,000.00 imposed on petitioner, as aforesaid, and the payment of all costs, which said [fol. 4] supersedeas bond your petitioner was absolutely unable to make and furnish by reason of the fact that he was penniless and a pauper, and could not secure the execution of such a bond. That by reason thereof he was necessarily confined in the Tarrant County jail, as aforesaid, pending said appeal.

Your petitioner further represents that just immediately prior to the time that he was transported to and placed in the United States penitentiary at Leavenworth, Kansas, this honorable court, acting by and through Judge James C. Wilson, entered its order and judgment that the service of the sentence imposed upon your petitioner in said cause should commence as of the date on which your petitioner was confined in Tarrant County jail, as aforesaid, to-wit, the 21st day of November, A. D. 1923, so as to order and decree that the time served in the said Tarrant County jail, as herein set forth, should apply as so much service of the sentence imposed upon your petitioner in said cause. That giving due effect to said order your petitioner has served more than three years of his said sentence, and that in any event he has been continuously confined and incarcerated by virtue of said conviction since the said 21st day of November, A. D. 1923.

Your petitioner further represents that the customary and usual sentence imposed upon violators of section 215, commonly known as the mail statute, is not in excess of five years, and that had your petitioner received a total sentence of not exceeding five years he would now be eligible to parole under the United States' parole act. Your petitioner further represents that the sentence imposed upon him, as he conscientiously believes and alleges was and is excessive and greatly out of proportion to the offense for which he was convicted and out of proportion to the punishment which is usually meted out to like offenders.

Your petitioner further represents that he is a man now past sixty-one years of age and that if he is required [fol. 5] to serve the entire period of fourteen years and nine months sentence he will probably spend the remainder of his life confined in the United States Penitentiary. That prior to the time your petitioner was charged by said indictment with violation of the said section 215 in said cause, he had never been charged

with, nor convicted of any offense whatsoever, and that he has never been convicted except in said cause. Your petitioner further says that being a man well known nationally as well as internationally he has suffered untold punishment by virtue of his conviction and incarceration, as set forth herein, and that the ends of justice and the best interest of the public as well as your petitioner will be subserved by this Honorable Court placing your petitioner upon probation, as herein sought.

WHEREFORE, premises considered, your petitioner prays this honorable court that the Government of the United States, through its District Attorney, located at Fort Worth, Texas, to-wit, Henry Zweifel, be given due notice of this application, and that a time be fixed for a hearing hereof, and that upon hearing of this application this Honorable Court enter due and appropriate orders placing your petitioner on probation for a period of five years, in the care of a special probation officer to be appointed by this court to act without compensation, and ordering and directing the officers in charge of the United States penitentiary at Leavenworth, Kansas, to forthwith discharge and release your petitioner from custody.

(Sgd) Frederick A. Cook, Petitioner.
(Sgd) H. C. Wade, Attorney for Petitioner.

[File endorsement omitted]

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

RESPONDENTS REPLY
Filed March 3rd, 1927.

To the Honorable James C. Wilson, Judge of said Court:

Comes now the United States, through and by Henry Zweifel, its United States Attorney for the Northern District of Texas, and in reply to the petition of the said Fred-

erick A. Cook filed in this Honorable Court on the 8th day of February, 1927, wherein application is made for probation for a period not exceeding five years as provided in the Act of March 4, 1925, and respectfully submits and alleges as follows:

I.

That heretofore, to-wit, on the 21st day of November, 1923, Cause No. 2273, Fort Worth Division, the petitioner was convicted by this Court on twelve counts of the indictment which charged a violation of Section 215 of the United States Criminal Code and was then and there in this Honorable Court sentenced to serve in the United States penitentiary at Leavenworth, Kansas, a total of fourteen years and nine months and to pay a fine of $12,000.00, and thereafter this Court caused said petitioner's sentence to commence as of the 21st day of November, A. D. 1923.

That the petitioner, at the time of the offense [fol. 7] aforesaid, was a man of mature years and intelligence, being fully aware of all acts committed by him and the consequence thereof; that he was not merely technically guilty of the violation charged but same involved a great amount of moral turpitude; that he was given a due and just trial, same having been appealed to the Supreme Court of the United States, and the conviction imposed by this Honorable Court affirmed and sustained in all things; that the amount of time already served by petitioner, which, taking into consideration the antedating of the sentence by the Court, amounts to a period of only three years and three months, such period of time not being sufficient punishment for the serious and grave offenses of which the petitioner was found guilty and convicted.

That if petitioner were released at this time upon probation, he would be compelled to return to the penitentiary five years hence and serve the remainder of his sentence, which your respondent says was not the intention and meaning of Congress in the passage of the Probation Act of March 4, 1925, aforesaid.

That all things considered, petitioner's application for release upon probation is without merit at this time and his petition should, accordingly, be, in all things, denied by this Court on the ground that said petition is without merit and foundation at this time.

II.

That, even assuming said application and petition to be meritorious, without admitting same, your respondent says that this Honorable Court is without jurisdiction to hear and pass upon this application as:

1. The Court does not have the power to admit or release a defendant upon probation after a partial service of the sentence has commenced.

[fol. 8] That it was the intention of Congress in the passage of the Probation Act, to vest in the Courts of the United States the power, which they did not legally have prior to the enaction of said Act, to suspend sentences in necessary cases such as first offenders and in those instances where a suspension of sentence or release of the defendant upon probation, would subserve the best interests of society in placing an unfortunate defendant upon probation, keeping the stigma of a penitentiary sentence from his name; and it was not the intention of the Congress that this Act should be materially radical or different from the majority of Probation Acts now in effect in most of the States nor was it the intention that this Act should give the Courts of the United States power to release a defendant upon probation after he had begun the service of his sentence.

2. The court does not have the right to exercise the power of release upon probation after the expiration of the trial term in which the judgment of conviction was rendered.

3. The Probation Act of March 4, 1925, does not apply to a defendant who was convicted and had commenced the service of his sentence prior to the passage of the Act and especially when the term of Court in which the defendant

was convicted had also expired before the passage of the Act.

WHEREFORE all things being considered your respondent prays of this Honorable Court that Frederick A. Cook, the petitioner herein, be denied his petition and that the said application, in all things, be dismissed.

(Sgd) Henry Zweifel, United States Attorney.

[File endorsement omitted]

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

JUDGMENT—March 17, 1927.

On this the 17th day of March, A. D. 1927, came on to be heard the application of petitioner Frederick A. Cook in the above entitled and numbered cause wherein he petitions this honorable court for an order, judgment and decree placing him upon probation for a period of five years in accordance with the Parole Act passed by Congress March 4, 1925; and petitioner appeared by his attorneys and the Government, having filed an answer to said petition, appeared by the United States District Attorney in and for the Northern District of Texas, to-wit, Henry Zweifel; and the court, having fully heard and understood the pleadings, evidence and argument of counsel and being fully advised in the premises, and it appearing to the satisfaction of this court that the ends of justice and the best interests of the public as well as of this defendant and applicant Frederick A. Cook will be subserved by granting said application and placing petitioner upon probation as herein provided, the court is of the opinion that said application should be granted.

It is therefore ORDERED, ADJUDGED AND DECREED that the execution of the sentence of imprisonment and to pay a fine of Twelve Thousand Dollars ($12,000.00) [fol. 10] heretofore imposed upon the said Frederick A. Cook in this case by this court be, and the same is hereby, suspended and the authority of the Warden and other officials of the United

States penitentiary at Leavenworth, Kansas, to hold the petitioner under the judgment of this court, and the commitment issued thereunder, is hereby revoked, until the further orders of this court, and that petitioner Frederick A. Cook be, and he is hereby, placed upon probation for a period of five years conditioned only that while on probation said Frederick A. Cook, shall report once every six months to W. Erskine Williams, and further conditioned that he shall abide by and obey the laws of the United States, the State of Texas, and each and every other State or Country where he shall be situated during said period; and that the said W. Erskine Williams is hereby appointed special probation officer by this court to receive the reports every six months herein provided for from Frederick A. Cook, and to transmit the same to this court.

It is further ORDERED, ADJUDGED AND DECREED that the warden of the United States penitentiary at Leavenworth, Kansas, as well as all officers and agents of the United States Government in charge of said United States penitentiary at the place aforesaid be, and they are hereby ordered, directed and commanded to forthwith discharge and release the said Frederick A. Cook from custody and from the said penitentiary and the clerk of this court is directed to transmit under the seal of this court to the said officials in charge of the said penitentiary at Leavenworth, Kansas, a certified copy of this order, judgment and decree.

James C. Wilson, United States District Judge.

[File endorsement omitted]

[fol. 11] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

BILL OF EXCEPTIONS

Filed March 25, 1925.

To the Honorable James C. Wilson, Judge of Said Court:

Now comes the United States of America through and by

Henry Zwiefel, its United States Attorney for the Northern District of Texas, and would respectfully take exception generally and specifically to the ruling and order of the Court entered on this, the 17th day of March, A. D. 1927, wherein Frederick A. Cook was released on probation under the Act of March 4, 1925, and wherein the payment of a fine in the amount of $12,000.00 assessed in said cause was suspended by the Court, in that the Court was without jurisdiction to entertain and hear the petition hereinbefore filed in this matter and was without jurisdiction and lacking in power and authority to so release the said Frederick A. Cook on probation aforesaid or to suspend the payment of his fine of $12,000.00.

Respectfully,

Henry Zwiefel, United States Attorney.

Settled, Approved and Ordered Filed this the 25 day of March, 1927.

James C. Wilson, United States District Judge.

[File endorsement omitted]

[fol. 12] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

PETITION FOR WRIT OF ERROR

Filed March 25, 1927.

To the Honorable James C. Wilson, Judge of Said Court:

Comes now the United States of America by and through Henry Zwiefel, its District Attorney for the Northern District of Texas, and would respectfully show to the Court that an order was entered herein on the 17th day of March, 1927, against your petitioner and in favor of Frederick A. Cook, wherein the said Frederick A. Cook was ordered released from the Federal Penitentiary at Leavenworth, Kansas, where he is now incarcerated serving a sentence of fourteen

years and nine months for violation of Section 215 of the Criminal Code, said Frederick A. Cook being released on probation under the Act of March 4, 1925, and further that to the ruling and order of said Court the United States of America has expressly taken its general and specific exceptions, said exceptions being allowed by the Court and said order was on the 17th day of March, 1927, made final.

And your petitioner the United States of America feeling that it is aggrieved by said ruling and order in that it is of the opinion that the Court was without jurisdiction to hear and entertain said petition for release on probation at the time it was so heard, hereby petitions the Court for an order allowing a writ of error to this petitioner and allowing this petitioner to prosecute writ of [fol. 13] error to the Circuit Court of Appeals for the Fifth Circuit from the District Court of the United States for the Northern District of Texas, Fort Worth Division, and in connection with this petition, petitioner herewith presents his assignments of error praying that the order and judgment be reversed, and your petitioner further prays that this order be granted without requiring the United States of America to give an appeal bond in the matter.

Henry Zwiefel, United States Attorney.

[File endorsement omitted]

[fol. 14] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

ASSIGNMENT OF ERRORS

Filed March 25, 1927.

Comes now the United States of America by and through Henry Zwiefel, its United States District Attorney for the Northern District of Texas, plaintiff in error in the above entitled and numbered cause and in connection with its petition for writ of error in said cause assigns the following errors which plaintiff in error avers occurred on the hearing

thereof, and upon which plaintiff in error relies to reverse the order of the Court as entered therein, as same appears of record:

FIRST ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore assessed against Frederick A. Cook, defendant in error, (Petitioner below), and in ordering him released on probation from the Federal Penitentiary at Leavenworth, Kansas, where he was then incarcerated serving a sentence of fourteen years and nine months for violation of Section 215 of the Penal Code, as the Court was without power or jurisdiction to hear and entertain such petition and was without jurisdiction and lacking in authority and power to so release defendant in error and suspend the payment of his fine aforesaid for the reason that he had begun the serving of his sentence [fol. 15] prior to the passage of the Probation Act of March 4, 1925.

SECOND ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore assessed against Frederick A. Cook, defendant in error, (Petitioner below), and in ordering him released on probation from the Federal Penitentiary at Leavenworth, Kansas, where he was then incarcerated serving a sentence of fourteen years and nine months for violation of Section 215 of the Penal Code, as the Court was without power or jurisdiction to hear and entertain such petition and was without jurisdiction and lacking in authority and power to so release defendant in error and suspend the payment of his fine aforesaid for the reason that the term at which he was sentenced had long since expired.

THIRD ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore assessed against Frederick A. Cook, defendant in error, (Petitioner below), and in order-

ing him released on probation from the Federal Penitentiary at Leavenworth, Kansas, where he was then incarcerated serving a sentence of fourteen years and nine months for violation of Section 215 of the Penal Code, as the Court was without power or jurisdiction to hear and entertain such petition and was without jurisdiction and lacking in authority and power to so release defendant in error and suspend the payment of his fine afiresaid for [fol. 16] the reason that he had already begun the service of the sentence imposed upon him at the time of his petition for probation.

FOURTH ASSIGNMENT OF ERROR.

The Court erred in ordering defendant in error released on probation aforesaid as the Court was lacking in power and authority and without jurisdiction to so order, in that the Probation Act of March 4, 1925, under which said probation was granted, is void, and contrary and repugnant to the meaning and spirit of Article 2, Sections 1 and 2 of the Constitution of the United States when applied to a case as in the instant cause, in that an interpretation of the Act as here applied in a case as the one in hand is an encroachment of the judiciary upon the executive branch of the Government of the United States, as the Constitution expressly reserves the executive functioning of the Government to the President of the United States and further gives to the President alone, the power to grant pardons and reprieves.

FIFTH ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore assessed against defendant in error as the Court was lacking in power and authority and without jurisdiction to so order, in that the Probation Act of March 4, 1925, under which said suspension of fine was made is void and [fol. 17] contrary and repugnant to the meaning and spirit of Article 2, Sections 1 and 2 of the Constitution of the United States when applied to a case as in the instant cause, in that an interpretation of the Act as here ap-

plied in a case as the one in hand is an encroachment of the judiciary upon the executive branch of the Government of the United States, as the Constitution expressly reserves the executive functioning of the Government to the President of the United States, and further gives to the President alone, the power to grant pardons and reprieves which includes the suspension and remittance of fines and penalties.

SIXTH ASSIGNMENT OF ERROR.

The Court erred in ordering the suspension of the payment of the fine of $12,000.00 heretofore imposed on defendant in error, in that the Court is lacking in authority and power and without jurisdiction to so cancel debts and obligations to the United States and the Congress of the United States is without authority or power under the terms and provisions of the Constitution to delegate to the judicial branch of the Government such authority, the Probation Act of March 4, 1925, in this respect being void and unconstitutional.

SEVENTH ASSIGNMENT OF ERROR.

The Court erred in releasing the defendant in error on probation for a period of five years and in suspending the payment of the fine of $12,000.00 theretofore imposed upon him in accordance with the Probation Act of March 4, 1925, in that the Court was without jurisdiction to so order, since the Probation Act of March 4, 1925, is void and is repugnant and contrary to the meaning and spirit of [fol. 18] the Fifth Amendment of the Constitution of the United States and therefore unconstitutional, as the order of the Court expressly released defendant in error "upon probation for a period of five years in accordance with Parole" (Probation) "Act passed by Congress March 4, 1925," said Act granting to this Court the power to require defendant in error to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offenses for which conviction was had and for the support of any person or persons for whose support he is legally responsible, this rendering the order of

the court, which was as stated above, subject to this condition, an Act wholly without authority or law, in that said order carries with it the power of the court to deprive defendant in error of property without due process of law, and does in fact so deprive defendant in error of property and rights without due process of law.

WHEREFORE, plaintiff in error prays that the decree and order of said court be in all things reversed, and that a writ of prohibition issue against the trial court commanding that further jurisdiction in the cause be not exercised.

Henry Zwiefel, United States Attorney.

[File endorsement omitted]

[fol. 19] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

Filed March 25, 1927.

On this the 25 day of March, A. D. 1927, came on to be heard the petition of the United States of America, through and by Henry Zwiefel, its District Attorney for the Northern District of Texas, for the issuance of a writ of error on its behalf to the Circuit Court of Appeals of the United States for the Fifth Circuit.

It is hereby ordered that a writ of error to the Circuit Court of Appeals for the Fifth Circuit from the order and decree heretofore filed and entered herein in favor of Frederick A. Cook releasing him on probation for a period of five years from the Federal Penitentiary at Leavenworth, Kansas, where he is now incarcerated, be, and the same is hereby, allowed, and that a certified transcript of record, assignments of error and all proceedings in the case be forthwith transmitted to the Circuit Court of Appeals of the United States for the Fifth Circuit, duly certified according to law, in order that

said court may inspect the same and take such action therein as it deems proper, according to law.

[fol. 20] It is further ordered that the United States of America be not required to furnish appeal bond pending the review of this cause.

(Sgd) James C. Wilson, United States District Judge.

[File endorsement omitted]

[fol. 21] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

PRAECIPE

Filed March 25, 1927.

To George W. Parker, Clerk of the United States District Court for the Northern District of Texas, at Fort Worth:

Please prepare transcript of record in the above entitled and numbered cause and include therein the following instruments in the following order:

(1) Caption.
(2) Petition of Frederick A. Cook for release on probation.
(3) Reply of United States.
(4) Opinion of Court.
(5) Order of Court releasing petitioner on probation.
(6) Government's Exception to Ruling and Order of Court.
(7) Petition for Writ of Error.
(8) Assignment of Error.
(9) Order Allowing Writ of Error.
(10) Writ of Error.
(11) Waiver of Citation.
(12) Praecipe for Transcript.
(13) Certificate of Clerk.

Henry Zwiefel, United States District Attorney.

[fol. 22] We, the undersigned attorneys for Frederick A. Cook, hereby accept service of the above Praecipe, a copy thereof having been received by us, and we agree that the documnts shall constitute the transcript in this cause.

Callaway & Wade,
By H. C. Wade.

[File endorsement omitted]

[fol. 23] District Court Clerk's Certificate omitted in printing.]

[fol. 24] [Title omitted]

WRIT OF ERROR

Filed March 25, 1927.

The United States of America, the President of the United States—To the Honorable Judge of the District Court of the United States for the Northern District of Texas, Greetings:

Because in the record and proceedings, as also in the rendition of the order and decree on a plea which is in the said District Court before you or some of you, between the United States of America, plaintiff in error (Respondent below), and Frederick A. Cook, defendant in error, (Petitioner below), No. 2273 Criminal on the docket of said court in the Fort Worth Division of the Northern District of Texas, a manifest error hath happened to the great damage of the said the United States of America, as by its complaint appears.

We, being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Fifth Circuit, together with this [fol. 25] writ, so that you have the same at New Orleans, Louisiana, within

thirty days from the date hereof, in the said United States Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid, being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 25 day of March, in the year of our Lord, Nineteen Hundred and Twenty-seven.

(Seal) Geo. W. Parker,

Clerk of the District Court of the United States for the Northern District of Texas.

By G. B. Buckley, Deputy.

Allowed this the 25 day of March, A. D. 1927.

James C. Wilson, United States District Judge.

[File endorsement omitted]

[fol. 26] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

[Title omitted]

WAIVER OF CITATION

Filed March 25, 1927.

Comes now Callaway & Wade, Attorneys of Record for Frederick A. Cook, and accepts service, citation and notice of filing of the petition and writ of error herein, and here and now waive any and all other and further notice of the filing of such petition for writ of appeal.

Callaway & Wade,

Attorneys of Record for Frederick A. Cook.

By H. C. Wade.

[File endorsement omitted]

[Title omitted]

[fol. 29] OPINION OF TRIAL JUDGE

Judge Wilson: I will dispose of the petition of Frederick A. Cook for probation.

The petitioner alleges that he was convicted in this court on the 21st day of November, 1923, upon an indictment containing twelve separate counts, charging him with twelve separate offenses, under Art. No. 215, of the Code, and commonly known as the mail-fraud statute.

He alleges that immediately thereafter he took steps to appeal his case to the Circuit Court of Appeals; that a sentence of fourteen years and nine months in the penitentiary was imposed, and in addition a one thousand dollar fine under each count; that a supersedeas bond was required, which in its effect, would be the personal undertaking of sureties to discharge this fine, together with the costs, in the event the case was [fol. 30] affirmed, and that on account of his being a pauper, that he was not able to execute such bond; that the appeal of his case was taken on a pauper's affidavit, and was pending until April, 1925, at which time it was affirmed; that on account of not being able to execute this supersedeas bond, he was compelled to remain in the county jail from the date of his conviction, the 21st day of November, 1923, until his appeal was disposed of, and that immediately thereafter, waiving any rights he might have had to have the matter heard by the Supreme Court, he went immediately to the penitentiary; that taking into account the time served in jail, together with the time served in the penitentiary, he has now been punished for his offense, by such penal servitude, for over three years; that he is now something over sixty-one years of age, that if he is compelled to serve the full time that it will probably mean to him a life sentence; and alleges compliance with the law and the rules of the penitentiary, and prays that he be granted probation for a period of five years, under the Act of March 4, 1925.

The government in its answer denies that there is any merit in the application, and states that the defendant has not suffered sufficiently for the crime committed; that for

these reasons his petition should be denied, and in addition to this, puts in issue the jurisdiction of the court to hear this matter.

The questions in this case, since the petitioner is actually serving his sentence, involve all of the questions that have heretofore been raised in the adjudicated cases, [fol. 31] construing this statute. First, it involves the question as to whether this law is applicable to those convicted prior to the passage of the act, that being the situation of the petitioner. Second, as to the authority of the court to grant the relief prayed for, since the term of the court at which the petitioner was convicted and sentenced, has long since expired; and third, is the law applicable and can it be availed of after the commencement of the service of punishment, and, particularly, has the court such authority where that service and punishment is in a penitentiary, located in another state, and generally speaking, beyond the jurisdiction of this court.

It is necessary, in order to fully appreciate the purpose and objects of this act, and particularly the intent of congress, to look briefly to the causes that brought it about. In all of the cases involving a construction of this act, it has been cited that it was a response to the holding in Ex parte United States, 242 US, 27. In that case, a banker was convicted on a charge of embezzlement, the penalty then being five years, no more and no less. The defendant was sentenced by Judge Killitts to five years in the penitentiary and that sentence suspended for a period of five years and the term of the court, by special order, declared to be opened for a similar period, for the purposes of that case. The facts surrounding the case were such that warranted the action of Judge Killitts, provided he had the authority. The Supreme Court passed on the case in 1916, and Chief Justice White, in his opinion pointed out the trying situation of the district judges, where confronted with [fol. 32] defendants deserving such a remedy, and in effect held that such authority, to be vested in the district judges, was

called for in the interest of the administration of the criminal law itself, as well as by the most obvious considerations of humanity and public well-being, and in substance, gave advanced approbation of such a law, both as to its wisdom, and as to the adequacy of the power of congress to pass same.

Though this decision was cited in the reports of the committee and in the arguments before congress, it is my view that it had comparatively little to do with the passage of the act. And that to ascribe to that case and its holdings the existence of this law would very much narrow the scope of the real purposes and intent of congress. In the first place, it was not passed until nine years after that decision, and in granting powers, under any construction, it goes far beyond anything involved or advised in that case. The proponents of legislation, as advocates do, put forth the strongest arguments they can devise to support their proposition. It was unusual to have the advance approval of the Supreme Court, as to any proposed legislation, both as to its wisdom and constitutionality, and naturally such an eminent authority would be much quoted. In these same reports and arguments we see juveniles cited so much as the beneficiaries of the act, and adult offenders nowhere mentioned, that the government in this case is taking the position that the petitioner is not in the class intended to receive its benefits. Of course appeals to help children are most persuasive and this accounts for the frequent references to juveniles, but since, when we come to the [fol. 33] act itself, we find them not mentioned, and its terms general, it applies of course to one class of offenders the same as another.

It is clearly and concededly, with or without this decision, a remedial statute and comes as another step in a course of dealing by congress with the subject, and looking to a more humane, a less rigid and a more elastic system of the administration of criminal punishments. For instance prior to 1902 there were various kindred laws passed providing for commutation of sentence, so much per month being

deducted from the prison sentence, to well-behaved prisoners. These laws were inadequate, and in 1902 Congress passed our present commutation statute, allowing so much a month to be deducted from prison sentences, this amount varying according to the length of the sentence, the greatest time allowed being ten days per month, this being allowed for those sentenced for ten years or greater periods, and equal practically to one-third of the sentence; of course this depending upon the observance of the rules of the prison where confined. (Com. S. Sec. 10532.)

These commutation statutes were evidently deemed inadequate, and in 1910, in pursuance of this humane policy, Congress enacted our present parole law. The commutation statute does not apply and can not be availed of by any prisoner sentenced to less than six months. The parole law, on the other hand, does not apply to any except those whose prison sentences are greater than one year and in no event until one-third of the total time has been served. Since the parole law [fol. 34] does not apply to any prisoners sent for a year or less and since the commutation statute does not apply to any sentence of less than six months, it is obvious that a great majority of those given imprisonment sentences in the federal courts receive no benefits or practically none under either of these statutes, and just as obvious, as a fulfillment of such a humane policy, that these statutes combined are wholly inadequate.

It will hardly be contended, at this period of enlightenment in such matters, that those sentenced for a year or less may not in some instances be deserving of the benefits of some such remedial legislation. Two defendants may appear before the Judge, charged with the same offense, shown to have had identically the same connection with it, and one be justly sentenced to six months in the county jail and the other to five years in the penitentiary. One may be a first offender with a blameless life, shown to have been led and

influenced, and the other with a long criminal record, tending to show an inate criminal character. In such a case one punishment would be as great as the other, and who would contend that such remedial legislation should be extended to the five year man and entirely denied to the six months man? Yet up to the passage of the present probation law that was exactly the state of our laws upon the subject, except where pardon or commutation might be granted by the president. The pardoning power in the president of course existed all the while, but for practical purposes, to a man in prison without friends or money, that power was too distant to be reached.

[fol. 35] During the time that Congress was passing these various acts the states of the Union, one after another were passing probation, suspended sentence and similar remedial statutes, showing that public opinion was gradually being crystalized into a favorable attitude towards them, until in 1915, when, it had reached the point that there was a strong public demand upon Congress for such legislation. This humane policy of Congress, this public demand, this advice of the Supreme Court, given in the case in question, together with the realization that all of these laws, touching the subject of relief against unjust punishments and bondage, were woefully inadequate, to my view, brought about our probation statute. Under this law the smallest offender, with the smallest punishment, either by imprisonment or fine, may be a beneficiary. It seems to have been the broad view of Congress that, since the citizen was surrounded with every possible safeguard to prevent his illegal conviction, it was no less important for him to be surrounded with every possible safeguard to prevent the imposition of unjust punishments and the execution of same.

The provisions of the act, pertinent here, are as follows: (Compiled Statutes Sec. 10564 4-5—10564 4-5 C.)

"Be it enacted by the Senate and House of Representatives

of the United States of America, in Congress assembled, That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interest of the public, as well as the defendant, will be [fol. 36] subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: Provided, that the period of probation, together with any extension thereof, shall not exceed five years.

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

"Sec. 2. That when directed by the court the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. [fol. 37] Thereupon such probationer shall forthwith be taken before the court. At

any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

It will be readily seen, on the very face of the act, under any construction, that it grants very broad powers to the district courts, going, in certain provisions, far beyond any powers granted to the president or to the parole board. As a single grant of powers to such courts it hardly has a parallel in the history of our legislation, and particularly is this true, if the construction insisted upon by the petitioners for probation under this act is to be accepted. In other words it, in effect, practically gives to the district courts advance pardoning power, in that it leaves it to the discretion of the court whether any sentence at all be imposed, and if imposed, whether its execution be suspended, which alone places upon the courts an awful responsibility, to say nothing of the powers which it gives to assess damages against prisoners, without a trial to determine same, and the power to impose the duty of restitution upon defendants, or to support their wives, children, etc.

From a fair reading of the act the conclusion can not be escaped that Congress did not hesitate to exhaust itself of all the powers it had on the subject, and lay [fol. 38] them upon the courts. On the other hand, if the view of the government, as we gather it from the adjudicated cases, is to be accepted, the scope of this law will be narrowed to a point, where, in a large measure, the humane and wholesome purposes of Congress, in passing same, will be defeated, and the law itself, in usefulness, reduced practically to a nullity. Those respective views will be discussed presently.

The question on which the government and the petitioner

are so sharply at issue here is: Has this court the jurisdiction to grant probation after service of punishment has commenced in a penitentiary?

The cases wherein this statute has been construed are as follows:

Nix v. James, 7th Fed. (2d) 590.
U. S. v. Nix, 8th Fed. (2d) 759.
U. S. v. Chifani, 14 Fed. (2d) 622.
Archer v. Snook, 10th Fed. (2d) 567.
Kriebel v. U. S., 10th Fed. (2d) 762.
Davis v. U. S., 697, 15 Fed. (2d).
Evans v. U. S. District Judge, 12th Fed. (2d) 64.
Mouse v. U. S., 14 Fed. (2d) 202.

The state of judicial opinion as to this law is very much divided, with no opinion by the Fifth Circuit and none by the Supreme Court.

The Ninth Circuit Court of Appeals in the Nix v. James case, in a well reasoned opinion, by Judge McCamant, held the law was applicable and that the remedy [fol. 39] could be availed of by those convicted and sentenced prior to the passage of the act and at terms expiring prior to the filing of the petition. The Seventh Circuit Court of Appeals in the Kriebel case held the same thing and approved the holding in the Nix case, differing only slightly in the reasoning touching the second question. The Sixth Circuit Court of Appeals in Evans v. District Judge, in effect held the same thing, expressly approving the conclusions in the Nix and Kriebel cases.

The effect of the commencement of service of the punishment was not involved in either of these cases and this question was not passed upon by either of these Circuit Courts, the Ninth and Seventh Circuits expressly disclaiming any purpose to do so. No district court, as I recall, has specifically held that the law is not applicable to those convicted

and sentenced prior to the time of the passage of the act, but several have held that the expiration of the term at which sentence is imposed shuts the door to probation. Their holdings to this effect seem, in the main, to rest upon United States v. Mayer, 235 U. S., 55, which holds that the court cannot set aside or alter its judgment after the expiration of the term. The government here insists that if it had been the purpose of Congress to change the rule laid down in that decision that it would have said so in the act. There may have been such an occurrence in our legislative history, but I do not recall where Congress has ever undertaken expresly to repeal any decision. It seems to me to be a sufficient answer to any such contention that there is no such limitations in the statute, but Judge Anderson in the Kribel case points out very clearly that the case [fol. 40] of United States v. Mayer does not apply in this situation and the rule there is not effective, for the reason that a suspension of the execution of sentence does not alter the original judgment imposing such sentence. Though, in this regard, he differs very pointedly from Judge McCamant in the Nix case, I think he is correct. The suspension of the execution of the sentence affects the prisoner and the service of the punishment. The willful release of a prisoner from jail by the Marshal or of a prisoner from the penitentiary by the Warden would suspend the execution of sentence, but certainly would not alter the judgment. The only difference is that what they would do unlawfully, the court itself would do lawfully. The granting of parole is a suspension of the execution of sentence, but of course does not alter the judgment under which the prisoner is held. If he is later returned to prison on account of a violation of his parole the original judgment is fully in effect and the execution of the sentence is then carried out.

As to whether this act is applicable to those convicted and sentenced prior to the act, or its passage, it may be suggested that Congress did not so intend otherwise it would have

said so, as it did in the commutation and parole statutes. Each of those statutes are made applicable to "every prisoner who has been or who may hereafter be convicted" (Comp. St., Sec. 10532 and 10535). So expressly providing in these two statutes rather is evidence to my mind that it is the intent and purpose of Congress that such remedial statutes, all of these being very similar, and the relief provided should be available to those convicted prior to the passage of the act. [fol. 41] The difference between the commutation and parole statutes and this probation statute is, that in the former this purpose is expressed and not left to construction, while in the latter the words used are, "after conviction," which the Ninth and Seventh Circuit holds means the same thing, and I think the difference in this regard is rather due to the difference in the draftsmen that drew the respective bills. Why would Congress so intend in one such remedial statute and not in another? This is after Dr. Cook's conviction. Do you suppose that Congress, inspired by the example of the unjust punishment and the hard bondage of those already convicted, to pass this remedial law, would, at the same time, intend to deny them the remedy and benefits of the law? If the government is right in its contention, all of those persons throughout the United States, convicted on the 4th day of March, 1925, at an hour however prior to the passage of this act, even though not sentenced, would be denied all relief under this law. Such would be a harsh purpose, and if it required a liberal construction in order to avoid such an unjust result, should be resorted to.

In the government's brief in Ex Parte U. S., Vol. 242, page 32, we find, "Humanitarian arguments do not touch the question of power or affect the necessities of preserving the constitution. Ample relief may be afforded by enlarging the general parole law. Judicial suspension opposes teachings of advanced criminology, with which the government is in entire sympathy."

If this may be taken as the government's attitude now [fol.

42] it is needless to say that it is out of harmony with American opinion on the subject, as evidenced by the action of the various states, as well as of Congress in passing this law. Humanitarian considerations are at the base of this statute. Congress rejected the advice of the government by undertaking to provide ample relief against the injustices under the old system, not by enlarging the powers of the parole board, but through judicial suspension, and evidently thought when it passed the present Act, to do so, was in line with teachings of advanced criminology. It was evidently the purpose of Congress to cover all of the deficiencies of previous laws touching the subject by a broad and far-reaching system of judicial suspension. These widely divergent views of Congress and the government, as expressed in its brief, must be kept in mind when we come to construe this statute.

The attitude of the executive branch of the government seems not to be very much changed, if any, since the case of Ex Parte v. the United States, as we gather that attitude from the various positions taken by the government in the cases arising under this law. For instance, again touching the effect of expiration of terms of court, it was, in effect, the attitude of the government in both the Nix and Kriebel cases that the right to seek probation under the law was lost because appeals were taken by those defendants from the convictions obtained. Congress is to be credited with knowledge of the practical operation of the courts, both trial and appellate, under the procedural laws, and to know that in the event of appeal that in all probability the terms of court, during which the defendant was convicted, will have [fol. 43] expired before the appeal is disposed of. The law of course applies to those pleading not guilty and convicted, as well as to those pleading guilty. It certainly was not the purpose of Congress to suppress appeals of those feeling aggrieved by conviction, nor to penalize those who seek redress from the wrongs they conceive have been done them by the courts, by an appeal of their cases. To hold that the door of pro-

bation under this statute is shut to a man because of the expiration of the term at which he was convicted and sentenced, in practical effect, would be depriving almost every man of the benefits of the law who dared appeal his case. Suppose a juvenile is convicted, being of the class primarily intended to be chiefly the beneficiaries of this statute, and his guardians or parents feel so aggrieved that they appeal his case. In almost every such case, considering the duration of the appeals and the length of time customarily taken to dispose of them, if such a construction was applied as contended for by the government, such juvenile would be deprived of all benefits under the law and the trial court would be helpless, however deserving the cause, to grant any relief under the act. Certainly such should not be the construction of the act unless its words plainly demand such construction. Such a situation as I have described would have the bare technicality of a closed term of court defeating the very purposes of Congress.

Now let us consider what could come, under the practical operation of this statute, from similar technicalities, if the law is finally to be construed as not applicable where the service of punishment has commenced. [fol. 44] The deprivation of worthy persons of probation on bare technicalities, is certainly to be abhorred and to be avoided, if it may be, by a reasonably liberal construction of the act. In this connection, also, Congress certainly knows the practical operations of the trial courts with respect to the passing of sentences. This was the subject dealt with in the Act. The customs of judges vary slightly. Two methods are generally followed. One court will sentence during the trial of the criminal docket and as rapidly as pleas of guilty and convictions are had, sentence will be immediately imposed and the prisoners, as they are passed upon, are taken charge of by the Marshal. Another court will follow the practice of having sentence day, at which time all of the defendants convicted during a week, or during a term, will be called up on one day and sentenced

one after another. I have followed both methods, varying with the circumstances. The congestion of the criminal dockets of the Federal Courts at this time is a matter of common knowledge. I have had more than fifty men appear before me during one sentence day. I have heard of some district courts passing on nearly a hundred in one day. I have had these sentence days in my experience come on the last day of the term. Now it will be readily seen that where there are great numbers of defendants coming before a court, that it is absolutely necessary that the court and all connected with the court work with the greatest possible speed to dispose of the business. The same situation of necessity of quick action confronts the judge who follows the practice of sentencing defendants during the trial of the docket, and as rapidly as [fol. 45] defendants enter their pleas of guilty or are convicted. Many of the defendants appearing in the federal court are not represented by counsel, not acquainted with the law or their rights and the majority of them are greatly embarrassed, are inclined to say little in their favor, and juveniles particularly are generally reticent. Either situation, where there is a great deal of such business confronting the court, makes it impossible to devote much time to hearing extended reports as to the history of the defendants, or for the judge himself to go into extensive examinations of defendants. On occasions where there are but few defendants the practice is otherwise and careful examinations of defendants are made. Of course the punishment, in a great majority of cases coming before the federal courts, is by either fine or imprisonment in jail. In other words the class receiving no benefits under the parole law and no benefits under the commutation statute, except those sentenced between six months and a year.

In the common run of cases where there is a congestion of business as described, the judgment of the court as to sentence is based upon the appearance of the defendant, the brief statement made, but largely upon the character of

the offense, the incidents connected therewith and the manner of its commission, etc. Take a case where the punishment is by fine, the prisoner goes immediately into the hands of the court bailiff and upon default of the payment of fine goes into the hands of the Marshal, just beyond the court room door, and commences instantly the service of his punishment. In the case of a defendant sentenced to jail he immediately [fol. 46] commences to serve his sentence when placed in the hands of the Marshal. Great latitude is allowed to United States District Judges in the matter of imposing punishment, ranging in a great majority of cases from a possible low fine to months in jail or years in the penitentiary. Defendants, where they contest their cases do not know in the first place that they are to be convicted, and in the second place, have no idea possibly of what their sentence is to be. The latter is true with respect to those entering pleas of guilty. They do not know whether they will be satisfied or displeased with the punishment or whether they would desire to seek probation at the hands of the judge.

The Sixth Circuit Court in the Evans case practically holds that the Act intends only that probation shall be granted as a voluntary matter on the part of the court and without application. I am not able to see any such limitations in the statute itself, and of course it is perfectly proper for the defendant to make application and for the court to hear it, where it has jurisdiction to do so. Now if any such defendants, receiving fine or jail sentences, should come back the next day, or within five minutes, for that matter, they can and will be met with the technicality that the service of their punishment has commenced and that the court is without jurisdiction. Now if the Supreme Court is to finally hold that this law is not available to any such defendants after the service of punishment has commenced, then, any one who knows the practical operations of the United States District Courts, as they are conducted today, will readily see that a majority of [fol. 47] those really intended to be the

beneficiaries of this remedial legislation will be denied any benefit under it, because they are not deserving, no, but because of the technicality of service of punishment commenced. That such was the purpose of Congress, if it did contemplate such practical results, is unthinkable. It is wholly inconsistent with the very act of passing such a statute.

I wish to emphasize this point right here with an actual occurrence in my court, since this law has been in effect. A woman about thirty years of age, with a good countenance, appeared in my court and entered a plea of guilty to the illegal possession of intoxicating liquors, consisting of whisky, beer and a variety of other liquors. My examination of her developed that it was her first offense, and though she was not charged with a sale, that she had these liquors for the purpose of sale and had been selling them, stating and explaining that it was in order to make a living for her children, etc. This is the common story of bootleggers, and the circumstances being conclusive that she had been selling liquor, I presumed she had the funds to pay a reasonable fine and assessed against her a fine of $250. She immediately passed into the hands of the bailiff and at the court room door, upon default of the payment of the fine, passed into the custody of the Marshal, to be taken presently to the county jail. When in the Marshal's office, being detained with other prisoners, and relieved somewhat of the embarrassment naturally incident to an appearance in a crowded court room, and realizing that she was actually imprisoned, it seemed she commenced to talk freely of her situation, and to relate fully facts that [fol. 48] would bear most persuasively in behalf of probation. In about twenty minutes the United States Attorney appeared before me and requested the privilege of suggesting probation for this defendant. The substance of the facts revealed by the District Attorney was that she had no money, was in great distress, facing the necessity of going to jail to serve out the fine; that her husband had deserted her; that she had three small children then at home, with no

one to earn for them, one a baby, sick in bed. Of course neither the probation law nor the commutation statutes applied to her case, and pardon was out of the question. The only remedy available would be the making of a pauper's affidavit, upon the making of which at the expiration of thirty days in jail she might be released. I reminded the District Attorney of the fact that she had served some twenty minutes of her sentence and that being true, if the position insisted upon by the government in this regard was correct that I was without jurisdiction to grant her any relief. But, of course, I agreed to take up the matter and consider probation for her.

It may be suggested in such cases, so deserving of consideration under this statute, and where the time of service is so slight, reducing the objection to a bare technicality, that the court would be warranted in so treating it and doing substantial justice in the matter. But such, if the government's construction is to be accepted, would not be following the law, and the judges are sworn to uphold the law, and any practice of usurpation or abuse of power by the courts should be frowned upon, as being essentially dangerous.

[fol. 49] On the other hand, there is more likelihood and much more likelihood of mistakes being made in the matter of the sentence imposed than in the matter of conviction. I recall one case, since this law has been in effect, where I sentenced a man, along with other defendants, to a year in jail. After the service of punishment had commenced, upon disclosures made by defendant's counsel and by government's counsel, I was convinced that a mistake had been made and suspended ten months of this time. There is no need going into detail but this action was absolutely warranted, the facts demanded the correction of the mistake. This law contemplates just such flexibility in the administration of criminal punishments.

Under the law, even during term time, after service of sentence is commenced, the District Court is without author-

ity, not only to increase the punishment, but as well without authority to diminish same. In re: Lange, 18 Wall. 163. Corpus Juris, Vol. 16, p. 1313-14. This statute does not authorize a change in the judgment sentence, after its service has commenced, but provides the remedy through suspension of execution.

Prior to the passage of this Act there was absolutely no remedy or relief against such unjust punishments, whatever they might be due to, except pardon. In the matter of the administration of criminal puniahments, prior to this statute, such illustrations shown, the law has been most rigid and inflexible. It seems it was the purpose of Congress to make such administration to the last degree elastic.

[fol. 50] Now suppose there is a judge on the bench, who, like the government, is opposed to the principle of "judicial suspension," any such judge could absolutely foreclose the issue of probation by refraining from exercising any of the authority granted by the Act at time of sentence by ordering defendants one after another, as sentenced, into the custody of the Marshal. Any such defendants could be met with the technicality that the court was without jurisdiction, since the service of punishment had commenced. Such a course of conduct would not be subject to revision by any appellate court. Thus every judge would have the power of raising a legal barrier not only against probation, but against a hearing of any pleas or applications for probation, despite the purposes of Congress, on the ground of no jurisdiction.

Now if the construction is finally placed upon the statute that would give authority to hear this woman's plea for probation after her service of twenty minutes of punishment, then it follows and must be held that the court has the authority to suspend the execution of punishment, where the service of it is in a penitentiary. No distinction can be found in the law between the service of the punishment in a jail or in the custody of the Marshal and in the penitentiary,

or the custody of the warden of same.

Judge Sibley, in the case of Archer v. Snook, 10th Fed. (2d) 567, where this identical question was involved, said: "I am convinced that such procedure, at least in the case of a penitentiary sentence, is unwarranted. [fol. 51] Penitentiaries are at a great distance from most of the judges. It would involve much complication to place persons on probation after arrival at the penitentiary." There is an inference in this statement that in practical operation it might be well to construe the law one way as applied to jail sentences, and another, as applied to penitentiary sentences. I am not able to see any such distinction in the law. And as to the distance from the judges, it is no farther to send a man to the penitentiary than it is to bring him back from the penitentiary. Though the Leavenworth Penitentiary is in Kansas and beyond the boundaries of Texas, yet it was upon the judgment of this court that the petitioner was placed in the penitentiary, and it is only upon the authority of this court and upon no other authority that he is held in the penitentiary. It is the commitment of the court authorizing his confinement there, and the judgment behind it, and of course here it is certainly not to be questioned that Congress has the authority to delegate to the court the power to take from, as well as to place in, penitentiaries, even though beyond the territorial jurisdiction of the court. This court has sentenced people to prisons located in almost every section of the United States. This is true, I am sure, of almost every district court. And too, prisoners in the penitentiary are not in charge of private individuals or corporations, but are under the control of the executive branch of the government. Any such judgment granting probation would need only to be recognized by a co-ordinate branch of the government.

Judge Sibley, when the above case was first presented, [fol. 52] entertained the view that the statute did authorize the district courts to exercise this authority after the service of

punishment had commenced in the penitentiary, but reversed himself when the application was actually presented.

Judge Jacobs of Arizona, in the Chafina case, 14 Fed. (2d), 622, held that such authority, by the Act, was vested in the district courts, and stated, "To hold otherwise, would be as is said in the case of Nix v. James, 7th Fed. 590, reading into the Act a limitation on the power granted, not written there by Congress. I am of the opinion that the Act clearly vests power in the trial court to admit a defendant upon probation at any time after conviction, either before or after service of the sentence has commenced, and before the full term of the sentence has been served."

Judge James, of the Southern District of California, when the Nix case was first presented, entertained the view that the district courts were not given such authority, but after the case was passed upon by the Ninth Circuit, though that specific question was not raised or passed upon, later construed the opinion of the Ninth Circuit Court of Appeals in the case to mean that the District Court was granted a continuing control over the matter of punishment and the amount of punishment that was finally to be meted out, etc., and in effect held that the District Court had such authority, as is conclusively shown by the fact that at the time he finally passed upon the application of the party Nix for probation, he indicated that, after a certain part of the [fol. 53] punishment had been served he would then entertain the application for probation. U. S. v. Nix, 8th Fed. (2d), 759. If the court was without such authority, its declaration, at the time of passing sentence, or at the time of passing upon the application for probation, of an intention to hear and grant probation after the service of a certain period in the penitentiary, would in no manner affect his right to do it. The court, nevertheless, would be without such authority.

It has been held in several Nebraska cases, unreported, that the district courts have such authority.

Judge Youmans of the Western District of Arkansas, in Davis v. United States, 15th Fed. (2d) p. 679, and Judge Pollock of Kansas, in the case of Mouse v. United States, 14th Fed. (2d) 202, hold to the contrary view, and that the suspension of the imposition or execution of sentence intended was applicable to that period between conviction and the beginning of the execution of sentence.

Judge Pollock in his opinion suggests, that to hold otherwise would be to permit the courts to invade the penal institutions of the country at any time during the term of imprisonment, and after all jurisdiction over the subject matter and the person of the offender has been lost. One of the very questions involved here is whether a continuing jurisdiction over the subject matter and the person of the offender has been granted, through this Act, to the district courts. I see no occasion for any note of alarm to be sounded because of the district courts being granted the authority to "invade the penal [fol. 54] institutions" and to release prisoners therefrom, if the welfare of the public and of the prisoner demand it. The district courts have alone the authority to place prisoners in penal institutions. Congress has not seen fit to place that power elsewhere, or even supervision of it with appellate courts or any other branch of the government, and under the latitude of punishments provided, it is in almost every case a matter of discretion with the courts whether the prisoner be confined in a penal institution. Expressed in the same way, the President, under the pardoning power, is granted the authority to invade such institutions and to empty them of their prisoners. The Parole Board, in a limited way, is granted the same authority. Congress itself has taken a hand in emptying the prisons through the commutation statutes. Even the Attorney General, without consulting the President, upon the mere application of the warden, is authorized to restore commutation to a prisoner who has lost same through bad conduct. (Comp. Stat. Sec. 10533.) And now comes the probation statute which, under

any construction, in some respects, goes far beyond any powers heretofore granted. It would seem from this general distribution of power, touching the subject of taking men from prison, that Congress was as much concerned in taking prisoners out as it was in putting them in. On the part of the Judge, it is more responsibility to send men to the penitentiary than it is upon any authority to take them out. Now these respective views as to the proper construction of this Act, touching the intent of Congress, are as widely divergent as the North is from the South. Really the [fol. 55] district judges are the ones to become alarmed if this very great responsibility is to be added to those they already have. The position could not be very well maintained in reason that the District Court, where the power to punish is exclusively lodged, would not also be a safe depositary of the power to end such punishment, and particularly in view of the personal contact and the personal observation of the trial judge of the defendant at the trial and of the incidents connected with the commission of the offense and particularly with the safety limitations provided in the Act itself, touching probation, its modification, revocation, etc.

The most common reason assigned, both by the lawyers and the courts, to support the view that the power cannot be exercised after the execution of sentence has commenced is, that such cases are covered by the parole law; some suggesting that the exercise of such power by the district courts would be in conflict with the parole authority. I am not able to accept these suggestions. As heretofore said, the parole law does not cover and has no application to the great majority of the cases sentenced to imprisonment in Federal Courts. It might be held, in a sense, to cover this petitioner's case, since if he lives some eighteen months or two years he will reach the point of eligibility to parole. At this time the parole law does not cover the petitioner's case. Now, on the other hand, there appears to be conflict, between such an exercise of authority by the courts and the parole

board, but rather the exercise of concurrent authority, insofar as the powers are the same, or similar. There is no conflict except where one power is made exclusive. [fol. 56] Of course with this construction, that the power may be exercised after the commencement of service of punishment, there would be in it in no sense a repeal of the parole power and such course was not the intent of Congress.

The President has the power of commutation of sentence; the Congress has exercised this power through its fixed statutes, working automatically to commute the sentence, conditioned only upon the observance of the rules of the prison. The Parole Board, in effect, exercises the same authority and even the Attorney General, in a limited way, exercises the authority of commutation. It has never been held that there is any conflict of authority here, but only that the authority is exercised concurrently by these different branches, or officials, of the government. The authority of the parole law is based upon the assumption that the prisoner, when he has served one-third of his time, and not before then, will have reformed, that the objects of punishment at that time will have been accomplished; and that the prisoner may then be trusted upon his verbal promise to obey the laws and respect the conditions of a parole. It could have been the purpose of Congress that this presumption, as is the case with the presumption of innocence, could be overcome by evidence, prior to the expiration of one-third of his sentence, showing he had reformed; that the objects of punishment had been attained, that he was worthy of such a test and trial, as is implied in probation, and that in such event the prisoner's punishment should cease. Certainly if such were the case further punishment would be [fol. 59] unjust, and the prime purpose of the law is to relieve against unjust punishment.

Also, it could have been the purpose of Congress that the trial judge, whether the service of punishment was in jail or in the penitentiary, should have the authority to relieve

against unjust punishments, due to mistakes in sentence. The trial judge has the intimate view of the prisoner, he sees him at the trial, he observes his conduct, and has an acquaintance from the lips of witnesses with the incidents connected with the commission of the offense, the manner of its commission, etc. The Parole Board, two of them being the Warden and the Physician of the penitentiary, have not the view of the court, but a view of the prisoner and his conduct while confined. The President, in the exercise of his commutation powers, has neither the view of the trial court nor the Parole Board, but his, supposedly, is a paper view. This power, ever so wisely exercised by each authority, might reach entirely different judgments, on a given case.

If Congress has seen fit to give three opportunities for the prisoner to obtain relief against unjust punishment, that is a matter with Congress. As a matter of safeguarding prisoners against unjust punishment, such an authority vested in the district courts, as well as in the Parole Board and the Attorney General and the President, could hardly be successfully attacked as being unwise.

But whether Congress considered the point and actually had the purpose to grant such authority is not [fol. 58] controlling at all. The words must be looked to, and it is commonly known that the framers of legislation often insert a word, the probable construction of which is understood by the proponents of the legislation, but which construction and the inevitable results escape entirely the thought and notice of a majority of the members of Congress. Were I privileged to judge as to the intent of Congress, by matters outside of the Act itself, the reports of the committees and the arguments on this bill, I would rather suppose that such was not the intent of Congress. We are reminded here, however, that Congress in passing what is commonly known as the White Slave Traffic Act did not intend, at least it was commonly understood that Congress did not intend, to cover personal escapades between men and women, but such was the construc-

tion given to the Act by the Supreme Court in the Caminetti case, 61 Law Ed. 442. In that case the Supreme Court said:

"It is contended that the Act of Congress is intended to reach only commercialized vice, or the traffic in women for gain, and the conduct of petitioner, however reprehensible in morals, is not within the purview of the statute, when properly construed in the light of its history, and the purposes intended to be accomplished by its enactment. It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body that passed it, the sole function of the court is to enforce it according to its terms. Where the language is plain and admits of no more than [fol. 59] one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meaning need no discussion."

The Supreme Court again, in Hamilton v. Rathbone, 44 Law Ed. 219 said:

"But where the Act is clear upon its face, and when standing alone, it is fairly susceptible of but one construction, that construction must be given to it."

Justice Brewer, speaking for the Supreme Court, in Holy Trinity Church v. United States, 143 U. S. 457, said:

"The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language he has used * * * * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Thus it is made plain that in seeking the meaning of Congress, in the main, we must look to the language of the Act, and by judicial construction no limitations should be added which are not found in its language; also that contingencies,

that before or after the service of sentence has commenced and as long as the full term of the sentence has not been served.

Though it may not be of much importance, let us look for a moment, to the significance of the word "when," as used in the statute. Its meaning may be varied, depending in each case upon the connection in which it is used. For instance, here it could have the significance of "if," reading "if it shall appear," etc. Had the word "if" been used instead of the word "when" it would better sustain the position of the government that this authority must be exercised at the time the judgment is pronounced. It may mean, on the other hand, the same as the words "in the event," reading "in the event it shall appear," etc. Of course, used alone as an interrogative it means "at what time." In other connections it might have the meaning and does have the meaning of the words "at any time." That, to my view, is its significance and the construction to be given to the word as used here, and if so, we have the statute in question reading, "at any time after conviction it shall appear to [fol. 63] the satisfaction of the court, the court shall have the power, etc.," and free of any limitations, so long as the service of sentence continues.

Now the construction applied and the reasoning to support that construction, by the Ninth and Seventh Circuit Court of Appeals, in the Nix and Kriebel cases, holding the law applicable to defendants convicted prior to the passage of this Act, and at terms of court expired before the petition for probation is filed, apply with equal force, and I think are even more cogent in supporting the proposition that the power of suspension of the execution of sentence may be exercised after the service of same has commenced. Each court expressed a disclaimer of any purpose to so hold, but let us look to the construction and the reasoning applied by the courts in those cases.

Judge McCamant, in speaking for the court in the Nix case, says:

"The statute plainly contemplates that in cases falling within its purview the district court shall retain control of the punishment to be meted out after sentence is pronounced and after the expiration of the term."

Certainly, in the absence of a limitation to that effect, it would not take a more liberal construction to hold that the statute also plainly contemplates that those may be beneficiaries of the Act who are serving sentences that should not have been pronounced against them. Upon what theory can it be held that Congress would intend that the sentence should be suspended after it was pronounced, presumptively, of course, upon [fol. 64] the theory that to enforce it would be unjust, and yet at the same time intend that the poor fellow who might per chance be serving out such an unjust sentence could not be a beneficiary under such remedial statute.

Again, Judge McCamant said, after quoting those provisions of the statute with respect to the authority to revoke or modify any condition of probation and to impose certain duties upon the defendant, such as the payment of damages, the support of those legally dependent upon the defendant, etc., as follows:

"These provisions of the statute clearly authorize the District Courts to modify from time to time the sentence imposed on a defendant, even after the expiration of the term at which sentence is pronounced. It may be suggested that these provisions of the statute are applicable only to the cases of defendants who have been put on probation at the time when sentence is imposed. The general power is granted to suspend the execution of sentence and to place the defendant upon probation. We do not think the power is lost by a failure to exercise it when judgment is pronounced."

If this is a correct interpretation, the inquiry naturally

arises, why should this power be lost, without any limitation requiring it, to the prisoner who is actually serving a sentence that either should not have been imposed upon him in the first place, or which should have been suspended after it was imposed.

Again he said: "The statute does not expressly exclude from the benefit of its provisions defendants who [fol. 65] have been sentenced to imprisonment at terms which expired prior to its enactment. The new power vested in the District Courts is available to them after conviction or after a plea of guilty or nolo contendere. THE STATUTE DOES NOT SAY HOW SOON AFTER CONVICTION OR PLEA THE POWER MUST BE EXERCISED. In view of the liberal construction to which this statute is entitled, you cannot read into it a limitation on the power granted not written there by Congress. Exceptional conditions justifying an abatement of criminal penalties may arise in the cases of defendants situate as is this petitioner. In other words, defendants sentenced at terms which expired prior to March 4, 1925, and who have not yet been imprisoned, may come within the mischief that Congress intended to remedy, and we should not by construction exclude them from the operation of the statute. The fifth section of the Act provides that it shall take effect immediately."

I again suggest that it certainly could not have been the purpose of Congress to permit an abatement of such criminal penalties, imposed prior to the passage of the Act, because, to impose them would be unjustified, and yet intend that in the case of the prisoner who was actually serving such unjust criminal penalties, the relief should be denied. The statement of Judge McCamant, that, "*The statute does not say how soon after conviction or plea the power must be exercised,*" certainly applies with equal force to the proposition that the power may be exercised after the service of punishment has commenced. Why should such liberal construction be [fol. 66] applied to save the prisoner who has never suf-

fered and deny this same salvation to the prisoner who has? It is incredible that it was intended by Congress to make any such discrimination.

A strong position can be taken that the words "after conviction" or "plea of guilty," as used by Congress, are prospective and not retrospective, and that Congress in using them was undertaking to deal with cases arising in the future, and requiring a liberal construction, to include within it those convicted prior to the passage of the Act and at terms of court expired. To reach the conclusion I have, as to the effect of service of punishment, does not require that liberal construction. Though the words are prospective and intended to deal with future cases, the matter of suspending the execution of sentence after service commenced would come plainly within them, certainly where that service was commenced, as in the case of this petitioner, subsequent to the passage of the Act.

Judge McCamant cited the case of Somers v. Johnson, 4th Vermont, 278; 24 Am. Dec. 604. This case involved the construction of a statute intended to relieve persons in prison for failure to pay debts. The words used and construed in that statute were, "Whenever any person is imprisoned," instead of, as in this statute, "after conviction." The Supreme Court of Vermont held that those words included those in prison prior to the passage of the Act, and this construction effectively supports the construction of Judge McCamant that the words "after conviction," include those convicted prior to the [fol. 67] Act. Judge McCamant, in quoting from this decision, included the following: "Any man is in prison each moment from the time of his commitment, to the time of his discharge; and there is no reason to believe that the Legislature intended to provide relief for those, who should afterwards be committed to prison, and leave in perpetual imprisonment those whose hard bondage alone dictated the necessity of the statute." In the Nix case where this was cited with approval, the defendant had not served any of the

punishment. This quotation and the reasoning of the Vermont Court is especially applicable to the present case, since the petitioner suffered more than a year of confinement in jail prior to the passage of the Act and pending the appeal of his case, and has served on his sentence nearly two years, commencing immediately after the passage of the Act.

Judge Anderson, in the Kriebel case, also disclaims any purpose to hold the Act applicable to cases after the beginning of punishment, but the reasoning in that case also, with equal force, to my view, supports the proposition that the authority may be exercised after punishment commenced. For instance he says,

"We are concerned here with a grant of power. The statute fixes a time when the exercise of it may begin, providing that it may be done "after conviction or after a plea of guilty of nolo contendere, but there is no limitation in the statute that it shall not be exercised after some other event."

There is no limitation here that in the event punishment is commenced the right to probation is lost. [fol. 68] There is certainly no reason, outside of the words of the statute, that any such thing should be held. The event, upon the happening of which the authority may be exercised, after conviction, is, that it appear to the satisfaction of the court that the ends of justice and the interest of the public and the defendant will be subserved. Regardless of whether Congress considered and had the specific purpose that the Act so operate, reasoned from matters outside of the statute itself and the reports and arguments touching this measure, I am not able to give any interpretation to the words used other than that it includes among its beneficiaries those suffering their punishments.

Now, touching the merits of petitioner's application. He was undoubtedly guilty of the offense charged and deserved punishment; how much punishment I do not know. The truest and most dependable tests of punishment are:

First: Does the punishment attain the objects intended?

Second: Does public opinion, after an acquaintance with all of the facts, and after due deliberation, approve of the punishment? This petitioner having laid claim to the discovery of the North Pole, at the time of his trial and conviction and sentence, was nationally and internationally known, and naturally the case, and the incidents of the trial attracted wide notice. After the trial was over and the sentence was imposed we were able to get the editorial opinion of the country as to this case. That opinion almost universally was that the [fol. 69] punishment of 14 years and 9 months imposed upon a man of the age of this petitioner was excessive, to say nothing of the $12,000 fine. And speaking of local sentiment as to this punishment, I candidly believe if the matter was submitted to a vote of the people of Texas, that 99 out of 100 would vote a disapproval of this punishment. I also have regarded this punishment as excessive from the time it was imposed. At the time of the petitioner's trial, the public mind was inflamed against that class of offenders who were using the mails to defraud in connection with the promotion of fraudulent oil schemes. This sentence to some degree reflects that state of mind, but I know judicially that the greater reason for the imposition of such an extreme punishment in years, was due to the fact that Judge Killits believed at the time he sentenced the petitioner, that he had stored away great sums of money. He so stated. If this assumption had been true, there would have been more warrant for such a sentence, but subsequent developments have disproved the correctness of that theory. After the sentence was imposed and notice of appeal given, a supersedeas bond was required of the petitioner, which had the effect when signed to hold the sureties bound to pay, in the event the case was affirmed, the $12,000 fine and the cost of the case, which amounted to a greater sum. The petitioner was not able to make this bond for the reason that he had no money, and though he had friends, the respon-

sibility was too great and he was not able to get sureties. As a result he made a pauper's affidavit and appealed his case. To my personal knowledge he remained in jail [fol. 70] from the 21st of November, 1923, until in April, 1925, pending the appeal of his case, and until it was affirmed. It is also within my personal knowledge that this confinement in jail almost resulted in the petitioner losing his life at one time during that period. Any rational person would certainly conclude that if a man had great sums of money stored up, and particularly a man of the career of the petitioner, that certainly he would not have remained in jail to almost die from the results of confinement pending the appeal.

The petitioner is about 61 years of age, and to be required to serve out this punishment would carry him to around 70 and in all probability would mean that this sentence was a life sentence. Under my view, the petitioner, by his service in the jail, and in the penitentiary for nearly three years and a half, has suffered sufficiently for his crime. He will suffer disgrace to some extent under probation.

Though probation is granted for five years, the petitioner, after that period, unless granted relief by the President, must return to the penitentiary. Believing, as I do, that the petitioner has been punished sufficiently now, I will suspend the execution of petitioner's sentence, and place him on probation for five years, with Judge Erskene Williams of Fort Worth, as special probation officer in this case, the conditions of such probation to be worked out and included in the judgment.

[District Court Clerk's Certificate omitted.]

[fol. 71] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:-

ARGUMENT AND SUBMISSION

extract from the Minutes of April 20th, 1927.

United States of America

No. 5056. versus

Frederick A. Cook

On this day this cause was called, and, after argument by Henry Zwiefel, Esq., United States Attorney, for plaintiff in error, and H. C. Wade, Esq., and Sam R. Sayers, Esq., for defendant in error, was submitted to the Court.

[fol. 72] OPINION OF THE COURT

Filed June 14th, 1927.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 5056

United States of America, Plaintiff in Error,

versus

Frederick A. Cook, Defendant in Error.

Error to the District Court of the United States for the Northern District of Texas.

Henry Zwiefel, U. S. Atty., (Henry Zwiefel, U. S. Atty., and J. Forrest McCutcheon, Asst. U. S. Atty., on the brief), for Plaintiff in Error.

H. C. Wade, and Sam R. Sayers, (Herbert C. Wade, Sam J. Callaway and John E. McGinness on the brief), for Defendant in Error.

Before WALKER, BRYAN and FOSTER, Circuit Judges.

WALKER, Circuit Judge: In November, 1925, Frederick A. Cook was convicted in the United States Court for the Northern District of Texas, under an indictment charging him with using the United States mails in executing a scheme to defraud, and was sentenced to serve in the United States Penitentiary at Leavenworth, Kansas, a total of fourteen years and nine months, and to pay a fine of $1,000.00 on [fol. 73] each of the twelve counts on which he was con-

victed. That judgment of conviction was affirmed by this court in February, 1925. Pursuant to an application made by Cook in February, 1927, while he was confined in that penitentiary and serving the sentence of imprisonment imposed upon him, the court in which he was convicted made an order suspending the execution of said sentence, revoking the order of commitment under which Cook was held in the penitentiary, and placing him on probation for a period of five years.

The court was without power to make that order unless power to make it was conferred by the Act of March 4, 1925, entitled "An Act to provide for the establishment of a probation system in the United States Courts, except in the District of Columbia." 43 Stat. 1259. The power to place upon probation is conferred by the following part of Section 1 of that Act:

> "That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: Provided, That the period of probation, together with any extension thereof, shall not exceed five years."

It is not to be doubted that a principal purpose of that

Act was to confer on designated Federal trial courts the power to suspend the imposition or execution of sentence in criminal cases, the lack of which power was strikingly brought to public [fol. 74] notice by the decision in ex parte United States, 242 U. S. 27. The enactment of the statute was evidence of the conclusion of the lawmakers that the trial courts mentioned should have the power, by suspending the imposition or execution of sentence, and placing the defendant on probation, to give him an opportunity to prove by his conduct that the ends of justice and the best interests of the public, as well as the defendant, will be subserved by postponing the imposition or enforcement of the penalty for the offense of which he was guilty. That statute cannot properly be given the effect of changing the law which was in existence when it was passed except so far as the language used discloses an intention to make a change. The law then in existence included the rule that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term, or the court's control of the case in which the judgment was rendered is retained in some authorized way, (United States v. Mayer, 235 U. S. 55; Ex Parte Lange, 18 Wal. 163), the Parole Act, providing for the release on parole of prisoners convicted of an offense against the United States and confined in a United States penitentiary or prison in execution of a judgment of conviction for a definite term or terms of over one year, or for the term of his natural life, (36 Stat. 819, 37 Stat. 650, Comp. Stat. §§10535, et seq.), and other statutes providing for the release of prisoners before the expiration of the terms of imprisonment for which they were sentenced. Comp. Stat. §§10529, et seq.

Nothing in the Probation Act indicates an intention to change the law as to the effect of the expiration of a term of court on the court's control or jurisdiction of a case in [fol. 75] which a final judgment was rendered during that

term. The statute is in the usual form of one conferring a new power on a court with respect to cases that may be pending before it for judicial action. Certainly it is not ordinarily to be implied that a power so conferred is exercisable in a case which has passed beyond the court's control by the rendition of a final judgment and the expiration of the term during which such judgment was rendered. The language used in conferring the power to suspend the imposition or execution of sentence, and to place the defendant upon probation, "after conviction or after a plea of guilty or nolo contendere," is entirely consistent with the absence of any intention to authorize the exercise of that power after the expiration of a term during which a final judgment of conviction was rendered. It well may be inferred that the language of the Act would have been different if the lawmakers had intended to change, as to the subject dealt with, the law with respect to the effect on a court's jurisdiction or control of a case of the expiration of the term during which that case was disposed of by a final judgment.

Nothing in the language of the Probation Act indicates an intention to change or add to the existing laws on the subject of releasing, before the expiration of the time for which they were sentenced, persons confined in execution of judgments of conviction of offenses against the laws of the United States. Before that Act was passed Congress, by the enactment of the Parole Act and other statutes above referred to, had adopted a plan for dealing with that subject. Those statutes disclose the intention of the lawmakers with reference to shortening terms of confinement entered upon by convicted [fol. 76] persons. To that end limited powers are conferred. In view of the existence of those statutes and of the absence from the Probation Act of any reference to them or to the subject of releasing from imprisonment persons who have already begun to serve sentences imposed, the conclusion is warranted that the lawmakers did not intend the Probation Act to empower the courts mentioned to make

such an order as the one now in question. If the Probation Act authorized the making of such an order each court exercising the power granted may, as to any imprisoned convict, set at naught the limitations and restrictions of the Parole and commutation statutes, leaving the system established by those statutes in force only so far as each of the courts mentioned, in the exercise of an unrestricted discretion, may permit it to remain in force. We do not think that the language of the Probation Act justifies the conclusion that it was intended to deal with the subject of releasing from imprisonment a person confined in execution of a judgment of conviction rendered at a term of court which has expired, or that it changed, modified, or to any extent repealed or superseded the statutes dealing with that subject.

Very conflicting views as to the meaning and effect of the Probation Act have been expressed by the different courts which have had occasion to consider it. We shall not attempt to comment on the opinions which have been rendered on the subject. The following are some of the cases referred to: Nix v. James, 7 Fed. (2d), 590; Nix v. United States, 8 Fed. (2d), 759; Kriebel v. United States, 10 Fed. (2d), 762; Evans v. District Judge, 12 Fed. (2d), 64; Chafina v. United States, 14 Fed. (2d), 697; Archer v. Snook, 10 Fed. (2d), 657; [fol. 77] Morse v. United States, 14 Fed. (2d), 202; United States v. Young, 17 Fed. (2d), 129.

The order under review is reversed, and the application in pursuance of which it was made is denied.

Reversed and rendered.

[fol. 78] JUDGMENT

Extract from the Minutes of June 14th, 1927.

United States of America

No. 5056. versus

Frederick A. Cook

This cause came on to be heard on the transcript of the

record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the order under review is reversed, and the application in pursuance of which it was made is denied.

[fol. 79] [Certificate of Clerk of U. S. Circuit Court of Appeals, Fifth Circuit, omitted in printing.]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.